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No. 98-591

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SUPREME COURT, U.S.

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In the  
Supreme Court of the United States

OCTOBER TERM, 1998

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Albertsons, Inc., *Petitioner*

v.

Hallie Kirkingburg, *Respondent*

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On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Ninth Circuit

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REPLY TO BRIEF IN OPPOSITION

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**I. Petitioner Does Not Rely on a Mischaracterization of the Record in Support of its Arguments.**

Respondent relies on the deposition testimony of Ms. Beatrice Michel, O.D. for the contention that Petitioner was incorrect in its characterization of the record before the Ninth Circuit. Ms. Michel's deposition testimony does not affect Petitioner's assertion that the Ninth Circuit, in reaching its decision, relied upon evidence that was not in the record.

By Respondent's own admission, Dr. Michel is Respondent's "treating doctor of optometry." (Brief in Opposition, pg. 2). Additionally, in Dr. Michel's deposition, she testified that she was not an expert in the area of cues upon which people rely for distance depth perception. (Appellant's Excerpts of Record, p. 204) ("Again, I'm not the expert in this area per se."). Thus, Respondent would be hard-pressed to deny that Dr. Michel was testifying at her deposition as Mr. Kirkingburg's "treating" doctor, not as an expert. In light of this distinction, Petitioner directs the Court's attention to the following excerpt of Dr. Michel's

deposition testimony (which appears directly following the testimony cited by Respondent):

- Q. I understand the answer you're giving me, but my question to you is, are you making assumptions because Mr. Kirkingburg has been monocular since birth as opposed to having run some specific tests or made some specific observations on him that tells you that he's functioning that way today because he's monocular since birth, or is this something that you generally believe to be true?
- A. I generally believe this to be true.

(Appellant's Excerpts of Record, p. 209).

Because Dr. Michel was not testifying as an expert, Respondent cannot rely on Dr. Michel's testimony regarding things she "believes to be true" as proper evidence upon which the Ninth Circuit relied to reach either its holding that the *manner* in which Respondent sees differs from the *manner* in which most others see or its holding that Respondent has personally compensated either in regards to depth perception or peripheral vision. (App. to Pet. for Cert., at 14a). Dr. Michel testified that she did not perform any tests that would have enabled her to make such conclusions and expressly stated that her conclusion as to how her patient functioned visually was a general belief.

The Ninth Circuit relied on facts that were not in the record before it when it reached its conclusion that Respondent had "developed subconscious mechanisms for coping with this visual impairment and thus his body compensates for his disability." (App. to Pet. for Cert., 14a).

## CONCLUSION

Respondent's Brief in Opposition does not diminish the grave importance of Petitioner's Questions Presented and the need for review by this Court.<sup>1</sup> Petitioner respectfully requests this Court to grant its Petition for a Writ of Certiorari.

### Rule 29.1 Listing

As previously stated on p. ii of its Petition for a Writ of Certiorari, Albertsons, Inc. has no parent companies nor nonwholly owned subsidiaries.

Respectfully Submitted.

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November 18, 1998

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<sup>1</sup> Other issues raised in Respondent's Brief in Opposition are addressed by Petitioner in its Petition for a Writ of Certiorari.